

**TESTIMONY BEFORE THE
ADMINISTRATIVE RULES COMMITTEE REGARDING
THE DEPARTMENT OF HUMAN SERVICES'
N.D. ADMIN. CODE CHAPTERS CARRIED OVER
FROM THE JULY 2003 MEETING
November 19, 2003**

Chairman Devlin and members of the Committee, my name is Melissa Hauer and I am an attorney with the North Dakota Department of Human Services' Legal Advisory Unit. At its meeting on July 16, 2003, the Administrative Rules Committee considered six chapters of the North Dakota Administrative Code that were amended by the Department: 75-02-01.2 (Temporary Assistance to Needy Families); 75-02-02 (Medical Services); 75-02-02.1 (Eligibility for Medicaid); 75-02-06 (Ratesetting for Nursing Home Care); 75-02-07.1 (Ratesetting for Basic Care Facilities); and 75-03-15 (Reimbursement for Providers of Services to Foster Children - Group Homes and Residential Child Care Facilities).

These chapters were carried over for additional consideration by the Committee and Committee members were encouraged to contact me with any questions they might have regarding these chapters. On November 4, 2003, employees of the Department met with Representative Clara Sue Price, Representative William R. Devlin, and Representative Jeff Delzer to discuss questions and concerns about these chapters. I received no inquiries from other Legislators regarding these chapters.

It is my understanding that the primary concerns expressed by the Committee at its July meeting were:

1. Whether there is a conflict between 2003 House Bill 1201 and the nursing home reimbursement rules (N.D. Administrative Code Chapter 75-02-06)?

There is no conflict between 2003 House Bill 1201 and the nursing home ratesetting rules in N.D. Administrative Code chapter 75-02-06.

House Bill no. 1201 provides that an individual, including a feeding assistant, performing nonhands-on tasks while employed in a medicare-funded organization is not governed by the Nurse Practice Act. This bill allows a feeding assistant to perform his or her duties in a nursing home, for instance, without the need to become a certified nurse aide (CNA). There was some concern that without such a law specifically exempting feeding assistants from the Nurse Practice Act, the federal regulations governing nursing home Medicaid payments would require feeding assistants to become CNAs if they were deemed to be performing nursing tasks as defined by the Board of Nursing. (see 42 C.F.R. § 483.75). Even before the current amendments to these rules were adopted, the Department allowed the costs of feeding assistants to be included in the direct care cost category. However, there was concern that a feeding assistant could be considered to be performing a nursing function. Thus, the bill was passed to make it clear that feeding assistants would not be governed by the Nurse Practice Act and therefore they would not be required by the federal regulations to become CNAs.

2. How many of the reimbursements paid by the Department are subject to a cost-of-living adjustment. The question arose when the cost-of-living adjustment for foster care facilities was eliminated in the rules. The concern was that if such adjustments are eliminated in some programs but not all, inequities will develop over time between programs.

The Department's budget for the 2003-2005 biennium includes funding for the following provider groups and, as described, the budget also includes an inflationary increase (which I have assumed is the equivalent of a cost of living increase) as follows:

? Family foster care providers: No increase.

- ? **Residential treatment centers:** No increase.
 - ? **Therapeutic foster care providers (PATH):** No increase.
 - ? **Foster care - group and residential:** No increase.
 - ? **Qualified Service Providers (SPED):** No increase.
 - ? **Nursing facilities:** An increase was granted. State law requires the Department to provide an inflation adjustment factor in its Medicaid nursing home rates. (See N.D.C.C. § 50-24.4-10(5) and N.D. Admin. Code § 75-02-06-16(4)).
 - ? **Basic care facilities:** An increase was granted. At the time the Department's budget was prepared in May 2002, the increase was required by administrative rule. The rule has since been amended to provide that an inflation adjustment is paid for basic care rates if funds are available (the adjustment factor applied does not exceed the lesser of the inflation factor allowed by the legislative assembly or the increase, if any, in the consumer price index). (See N.D. Admin. Code § 75-02-07.1-21).
 - ? **Developmental disability providers:** The executive budget did not include an increase for developmental disability providers. However, during the 2003 legislative session, a wage and fringe benefit increase for developmental disability provider staff was added.
3. The cost of maintaining a child in a foster care facility versus the Youth Corrections Center and the State Penitentiary. This comparison information has been provided by the Department and I understand it has been distributed to Committee members.
 4. A question was also raised regarding some language in the proposed amendment to N. D. Administrative Code Chapter 75-02-02 and specifically section 75-02-02-10.2 regarding the number of days in which a health care provider has to secure prior authorization for Medicaid payment of ambulatory behavioral health care. The Department would like to propose an amendment to this section to clarify that the provider has three business days in which to secure prior authorization.

5. **There were also some concerns about the amendments to N.D. Administrative Code Chapter 75-02-06 regarding Medicaid nursing home reimbursement. The amendments were made to clarify which nursing home workers are properly categorized in the direct care cost category. The previous rules were being improperly construed by some nursing facilities to allow the costs associated with some tasks to be included in the direct care cost category even though the tasks did not actually involve hands-on care for a resident.**

This ratesetting system was developed in the late eighties when the Department contracted with a consultant who actually did a time study on how much time it took to provide hands-on care services to individuals with varying degrees of need. The direct care category that was established based on the results of these studies did not include services provided by staff that was incidental to direct care, and which did not vary by the need of the resident, such as delivering linens or washing a resident's tray table. Those tasks are performed in the same way for a resident with low needs and a resident with high needs. In other words, the job to be done does not vary based on the needs of the resident.

However, there has been concern that certain nursing facility employees with developmental disabilities or cognitive impairments who provide care-related services under the supervision of a nurse may not be able to continue in their jobs if the costs associated with their salaries and benefits are not allowed to be included in the direct care cost category. To alleviate that concern, the Department proposes the following additional amendment to subsection two of section 75-02-06-02.2 of this chapter:

75-02-06-02.2. Direct care costs. Direct care costs include only those costs identified in this section.

...

2. Nursing.

- a. **Salary and employment benefits for the director of nursing, nursing supervisors, inservice trainers for nursing staff, registered nurses, licensed practical nurses, quality assurance personnel, certified nurse aides, orderlies, individuals providing assistance with activities of daily living identified in subdivision a of subsection 5 of section 75-02-06-17, individuals with a cognitive impairment who provide care-related services and who require the direction or supervision of a registered nurse in order to perform those services, and ward clerks.**

Care-related services would be those things that, while they are not hands-on care, do support direct care of nursing facility residents. It would include, for example, such services as delivery of linen to units and rooms; distributing water containers with fresh water; picking up soiled glasses; making unoccupied beds; washing beds, bedside tables, over-the-bed tables, wheelchairs, walkers, and other personal care items. It would not include housekeeping or facility management type services such as floor sweeping or meal preparation services. The amendment would recognize that a facility will invest more of its nursing staff time in directing or supervising an employee with a developmental disability or cognitive impairment who is performing these care-related services. The amendment would not allow a facility to include in the direct care cost category the salary and benefits associated with an employee who is not cognitively impaired who performs these same duties. Again, because that employee does not require the kind of supervision or direction that an employee with a cognitive impairment likely requires. The amendment is designed to allow individuals with cognitive impairments to obtain and retain employment.

The Department respectfully asks that the Committee approve these proposed amendments.

If you have questions, I would be happy to try to answer them. Thank you.

Presented by:

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